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8 THE REGENTS OF THE UNIVERSITY OF
9 CALIFORNIA, ROBERT BIRGENEAU,
CONSTANCE PEPPERS CELAYA, ADAN
TEJADA, VICTORIA HARRISON, ALLAN
KOLLING, TOM KLATT and SUSAN VON
SEEBURG

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

13 CHRISTINE CHANG, individually and as
14 Guardian ad Litem for ERIC SUN,
disabled

Plaintiff:

v.

17
18 **ROCKRIDGE MANOR
CONDOMINIUM, et al.,**

Defendants.

Case No. C-07-4005 EMC

**REPLY IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO
FRCP 12(b)(6) OR, IN THE
ALTERNATIVE, MOTION FOR A MORE
DEFINITE STATEMENT [F.R.C.P. 12(e)]**

Date: January 16, 2008
Time: 10:30 a.m.
Courtroom: C
Judge: Magistrate Judge Edward M. Chen

21 || I. INTRODUCTION

22 Plaintiffs' Opposition fails to address the key arguments in Defendants' Motion to
23 Dismiss and cites case law which is irrelevant and inapplicable to the issues presented. Thus,
24 Plaintiffs have failed to address the absolute immunities and defenses available to the University
25 Defendants. Instead, the opposition consists largely of vague, conclusory allegations about what
26 the University Defendants did or should have done which is clearly insufficient to overcome the
27 instant motion to dismiss.

1 **II. LEGAL ARGUMENT¹**

2 **Introduction through Section A**

3 In the “Introduction” section, Plaintiffs cite several irrelevant cases in support of their
4 opposition to Defendants’ Motion to Dismiss which should be disregarded by the Court: *Wyler*
5 *Summit Partnership v. Turner Broadcasting System, Inc.* 135 F.3d 658 (9th Cir. 1998) (*holding*
6 *plaintiff stated a claim for waiver of a contract condition that was placed solely for that party’s*
7 *own benefit*); *Parks School of Business, Inc. v. Symington* 51 F.3d 1480 (9th Cir. 1995) (*holding a*
8 *private loan guarantor was not a state actor acting under color of state law*); *Saylor v. Zeenat,*
9 *Inc.* Slip Copy, 2002 WL 33928621 (*dealing with unfair business practices and negligence per*
10 *se*).

11 In the “Summary of Argument” Section, Plaintiffs are clearly confused about Defendants’
12 immunity claims. Plaintiffs incorrectly claim that the University Defendants are not immune
13 pursuant to the Eleventh Amendment or under the qualified immunity doctrine, citing *Garcia v.*
14 *County of Fresno* 2005 WL 3143429 to support their contention. *Garcia* involved a Section 1983
15 claim against the County of Fresno and the Fresno County Sheriff. *Id.* The issue in *Garcia* was
16 whether the Defendant Sheriff could claim both immunity under the Eleventh Amendment and
17 qualified immunity. *Id.* at 2. Plaintiffs correctly cite a portion of the *Garcia* case, but misapply
18 its meaning. First, *Garcia* noted that the suit against the Sheriff in his official capacity was barred
19 by the Eleventh Amendment. *Id.* at 3. In regard to the qualified immunity doctrine, the Court
20 held that a plaintiff suing a state official in his individual capacity must allege facts that show the
21 individual police officer’s acts violated a constitutional right and that the constitutional right was
22 clearly established, i.e. a reasonable person would have known of the constitutional right. *Id.*

23 Here, as discussed in Defendants’ motion, Plaintiffs have failed to allege any facts that a
24 constitutional right was violated by any of the University Defendants in order to defeat qualified
25 immunity for any of the individually named University Defendants. This is a prerequisite to any
26 analysis regarding whether the constitutional right was clearly established. *Conn v. Gabbert* 526

27 ¹ For ease of reference, this Reply is organized sequentially to match Plaintiffs’ opposition subsections (Introduction
28 through Section L).

1 U.S. 286, 290 (1999). Moreover, no facts have been alleged that any particular right was clearly
 2 established. At most, plaintiffs allegations reflect nothing more than that the individual
 3 University Defendants were acting within the course and scope of their employment and that, in
 4 plaintiffs' opinion, they did not perform their administrative duties properly. As stated in the
 5 moving papers, these administrative and discretionary acts or omissions are clearly barred by the
 6 qualified immunity doctrine.

7 Plaintiffs also cite to the *Garcia* case for the proposition that liability attaches to The
 8 Regents where it causes the Constitutional violation. This argument is unfounded as *Garcia* dealt
 9 with the liability of a municipality, which has been held to be a person subject to liability under
 10 Section 1983. *See Monell v. Department of Social Services* 436 U.S. 658 (1978). As cited in
 11 Defendants' moving papers, The Regents and University Defendants acting in their official
 12 capacity are absolutely immune from suit. *Thompson v. City of Los Angeles* 885 F.2d 1439,
 13 1443 (9th Cir. 1989).

14 Plaintiffs next argue that the litigation privilege is inapplicable. However, plaintiffs
 15 provide no explanation or citation to support this argument and thus, defendants' contention
 16 should be deemed conceded.

17 In regard to the negligence claim, plaintiffs state that it is based upon the University
 18 Defendants' alleged "fraudulent concealment" and therefore the statute of limitations is three
 19 years. Clearly, plaintiffs are confused as to the claims they allege against Defendants as fraud
 20 and negligence are two separate causes of action. Defendants concede that the limitations period
 21 for fraud is three years. However, the limitations period for negligence is two years, and as such
 22 is time-barred.

23 Plaintiffs further argue that the malicious prosecution claim is based on the University
 24 Defendants' corroboration with plaintiffs' attorneys and the trial judge in the prior state court
 25 case. This argument is nonsensical as a malicious prosecution claim requires prosecution of an
 26 action against Plaintiffs.

27 In addition, Plaintiffs argue that the University Defendants were fraudulent and
 28 collaborated to cause Plaintiffs to lose the state court action. These are merely conclusory

1 statements, which do not rise to the level to state a claim for conspiracy. The same is true for
 2 Plaintiffs' final argument that Defendants committed fraud as plaintiffs allege no specific facts to
 3 support the claim.

4 Finally, as Plaintiffs have failed to provide any new facts or arguments to defeat the
 5 immunities and defenses, Defendants' Motion to Dismiss must be granted.

Section B – Statute of Limitations

7 Plaintiff argues in Legal Argument, Section B that the applicable statute of limitations is 3
 8 years for statutory liability, injury to property and fraud or mistake. Defendants do not refute that
 9 this is the law and are not claiming a statute of limitations bar to Plaintiffs' fraud claim.
 10 However, the University Defendants maintain, as argued in the motion to dismiss, that Plaintiffs'
 11 claims for violation of civil rights, malicious prosecutions/abuse of process, negligence and
 12 conspiracy are barred by the applicable two-year statute of limitations. Moreover, Plaintiffs'
 13 claim for fraud must still be dismissed as to the University defendants pursuant to the immunities
 14 afforded by Government Code Section 815 and 820.2, the litigation privilege and Plaintiffs'
 15 failure to allege with specificity the circumstances constituting the alleged fraud.

Section C – Defendant Constance Peppers Celaya

17 Plaintiffs next argue that the Eleventh Amendment to the U.S. Constitution does not apply
 18 to Defendant Constance Peppers Celaya. Plaintiffs cite two cases in support of this claim.
 19 However, these cases are inapplicable. Neither case, *Scruggs v. Haynes* 252 Cal.App. 256 (1967)
 20 or *Duffy v. San Francisco Police Department* 2005 WL 1785183 deal with the Eleventh
 21 Immunity issue. Indeed, *Duffy* involves whether plaintiff timely served defendants with a
 22 summons and complaint. *Duffy*, supra, 2005 WL 1785183. In *Scruggs*, the Court reviewed
 23 whether a police officer and the City of Long Beach were immune from civil liability pursuant to
 24 Government Code Sections 815.2 and 820.2. *Scruggs*, supra, 252 Cal.App. at 262-263. The
 25 Court held that extensive case law established that a police officer was not entitled to
 26 discretionary immunity for the use of unreasonable force in making an arrest prior to the
 27 enactment of Government Code Sections 815.2 and 820.2. *Id.*

1 This case is clearly distinguishable from *Scruggs* as it does not involve the issue of
 2 unreasonable force under color of state law. Moreover, *Scruggs* is inapplicable as it dealt with
 3 discretionary immunity prior to the enactments of Government Code Sections 815.2 and 820.2.

4 Plaintiffs attempt to argue that Defendant Celaya's conduct surrounding the alleged
 5 assault and battery on private property while defendant Celaya was doing her laundry precludes
 6 her from enjoying immunity for civil liability as she used unreasonable force against the
 7 plaintiffs. These contentions reflect nothing more than the plaintiffs' attempt to relitigate the
 8 underlying state court action, which is barred by the doctrine of res judicata and an attempt to
 9 create a civil rights violation from private conduct. Moreover, any claims she asserts concerning
 10 the alleged assaults are clearly time-barred.

11 As plaintiffs have provided no meaningful argument or additional facts, the claims against
 12 Defendant Celaya must be dismissed.

13 **Sections D and E – Defendants Tom Klatt and Victoria Harrison**

14 Sections D and E of the opposition claim that University Defendants Tom Klatt and
 15 Victoria Harrison are not immune from civil liability. Plaintiffs again cite to *Duffy* and *Scruggs*
 16 in support of their contention that the Eleventh Amendment does not apply to Defendants. As
 17 discussed above in Section C, these cases are inapplicable.

18 Essentially, Plaintiffs argue that Defendants Klatt and Harrison did not investigate or take
 19 any disciplinary action concerning plaintiffs' complaints of Defendant Celaya and therefore these
 20 defendants are not immune from liability. This is absurd as Plaintiffs have alleged nothing more
 21 than acts which occurred in the scope of Defendants' public employment, which was to evaluate
 22 whether to respond to a community complaint about a University employee concerning a matter
 23 unrelated to University business. As discussed at length in Defendants' Motion to Dismiss, such
 24 acts are clearly barred by the immunity afforded by the Eleventh Amendment. As plaintiff has
 25 failed to plead with any more specificity as to what constitutional rights Defendants Klatt and
 26 Harrison have violated or whether the constitutional right was well established at the time of the
 27 alleged violation, plaintiffs' claims against these defendants are barred by the qualified immunity
 28 doctrine.

1 In addition, these allegations are insufficient to state a claim. The allegations fail to state
 2 facts sufficient to create a duty to act on the part of any University Defendant. Moreover, the
 3 allegations establish the discretionary nature of any decision to investigate and that Defendants
 4 Klatt and Harrison were acting in the course and scope of their employment. Conclusory
 5 allegations that Defendant Harrison repeatedly violated the Constitution are insufficient to state a
 6 claim. Accordingly, the matter must be dismissed as to both Defendants Klatt and Harrison.

7 **Section F – Defendant Susan Von Seeburg**

8 Plaintiffs next claim that University Defendant Susan Von Seeburg is not immune from
 9 civil liability. Plaintiffs again cite to *Scruggs* and *Duffy*, which are inapplicable as discussed
 10 above.

11 In essence, Plaintiffs claim that Defendant Von Seeburg continued the “cover-up
 12 operation” by denying Plaintiff’s right to obtain Defendant Celaya’s “police training records.”
 13 These allegations are conclusory and fail to state any facts sufficient to support plaintiffs’ claims.
 14 Furthermore, the allegations establish that Defendant Von Seeburg was acting within the course
 15 and scope of her employment when she used her discretion as to how to respond to Plaintiffs’
 16 subpoena as well as whether to investigate a complaint by Plaintiffs. Accordingly, Eleventh
 17 Amendment immunity and the doctrines of discretionary immunity, qualified immunity and
 18 litigation privilege discussed above and in Defendants’ moving papers apply.

19 Plaintiffs also allege that a gross conspiracy existed between the University Defendants
 20 and Judge Castellanos. However, as discussed in Defendants’ moving papers, this is clearly
 21 insufficient to support a claim for conspiracy. *See also Taylor v. Mitzell* 82 Cal.App.3d 665, 673-
 22 675 (1978). In addition, the allegations concerning what occurred during the motion to vacate
 23 judgment are barred by the applicable statute of limitations. California Code of Civil Procedure
 24 Section 335.1.

25 Plaintiffs claim that Defendants Harrison, Tejada and Celaya committed a fraud against
 26 Plaintiffs by delivering a copy of the requested records directly to Judge Castellanos. As
 27 discussed in Defendants’ motion to dismiss, this cause of action is barred by the litigation
 28 privilege and state-based immunities afforded to the University defendants. Moreover, on its

1 face, the complaint fails to state sufficient and specific facts to support a claim in any event.

2 **Sections G and H – Defendants Alan Kolling and Adan Tejada**

3 As to Defendants Alan Kolling and Adan Tejada, Plaintiffs continue to argue that the
 4 immunity doctrines do not apply and cite *Scruggs* and *Duffy* to support their argument. See
 5 discussion in Section C above. Plaintiffs also claim that Defendants Kolling and Tejada
 6 somehow joined in the cover-up operation and committed fraud with regard to the release of
 7 Defendant Celaya's "training records." As discussed above, plaintiffs continue to fail to state
 8 sufficient and specific facts to support such claims and establish that these individuals were acting
 9 in the course and scope of their public employment and are entitled to Eleventh Amendment
 10 immunity, qualified immunity, and/or discretionary immunity afforded to public employees.

11 **Section I – Defendant Chancellor Robert Birgeneau**

12 Again, Plaintiffs claim that University Defendant Chancellor Robert Birgeneau cannot
 13 claim immunity and cite the *Scruggs* and *Duffy* cases. As discussed above in Section C, these
 14 cases are inapplicable. Plaintiffs further argue that Chancellor Birgeneau participated in the
 15 cover-up operation and "jointly defrauded against plaintiffs constitutional rights and torts claims,"
 16 but fail to provide any specific factually allegations as to the cover-up or violations of plaintiffs'
 17 constitutional rights and torts claims. As stated in Defendants' motion to dismiss, such
 18 allegations must be pled with specificity. *Taylor v. Mitzel, supra*, 82 Cal.App.3d at 673-675.

19 Plaintiffs also argue that Chancellor Birgeneau denied the service of process for the
 20 subpoena for Defendant Celaya's training records, caused parking citations to be issued against
 21 Plaintiff Chang, threatened students who helped Plaintiff Chang, refused to accept the Complaint
 22 and Summons, failed to investigate and discipline University employees following Plaintiff
 23 Chang's complaints, and "defrauded against" plaintiffs' constitutional rights and tort claims.
 24 These allegations are vague, conclusory and nonsensical. They are, on their face, insufficient to
 25 support Plaintiffs' claims against Chancellor Birgeneau. As discussed at length in Defendants'
 26 Motion to Dismiss, Chancellor Birgeneau, as the chief executive officer of U.C. Berkeley is
 27 entitled to the immunity afforded by the Eleventh Amendment, the implied immunity doctrine
 28 and the state based immunities afforded to public employees for conduct occurring in the course

1 and scope of their employment. Moreover, any acts or omissions concerning the present
 2 litigation is clearly barred by the litigation privilege.

3 **Section J – The Regents**

4 As to Defendant The Regents, plaintiffs continue to argue that the Eleventh Amendment
 5 does not apply and cite to the *Scruggs* and *Duffy* cases, which are inapplicable as discussed above
 6 in Section C. Plaintiffs also argue that The Regents were placed on notice as to the conduct of its
 7 staff, but failed to respond. As discussed in their moving papers, The Regents as a “state entity”
 8 and its officials are immune from suit pursuant to the Eleventh Amendment. See citations in
 9 moving papers. Plaintiff offers no authority to distinguish the well settled case law on this
 10 subject.

11 **Sections K and L – Conspiracy Claims**

12 In Sections K and L, Plaintiffs claim The Regents and individual University Defendants
 13 conspired with Judge Castellanos and plaintiff’s attorneys to defraud plaintiffs and prevent
 14 plaintiffs from recovery of damages. Plaintiffs cite to Defendant Celaya’s conduct prior to and
 15 during trial concerning plaintiffs’ assault and battery civil lawsuit. These “additional” allegations
 16 are duplicative to the allegations contained in the complaint and do nothing to circumvent the
 17 myriad of defenses available to the University Defendants. As discussed in the moving papers
 18 and above, the allegations are conclusory and lack the specificity required to uphold plaintiffs’
 19 claims. *See Taylor, supra*, 82 Cal.App.3d at 673; FRCP 9(b); *Moore v. Kayport Package*
 20 *Express, Inc.* 885 F.2d 531, 540 (1989). Moreover, any fraud/misrepresentation claims are barred
 21 by Government Code §818.8. As the instant Complaint is devoid of any facts that state a claim
 22 for fraud or conspiracy, these claims must be dismissed as to all University Defendants.

23 **III. CONCLUSION**

24 Defendants The Regents of the University of California, Robert Birgeneau, Constance
 25 Peppers Celaya, Adan Tejada, Victoria Harrison, , Allan Kolling, Tom Klatt and Susan Von
 26 Seeburg respectfully request that their motion to dismiss be granted in its entirety as Plaintiffs’
 27 claims fail as to all defendants as a matter of law. Plaintiffs’ Opposition fails to provide any
 28 additional facts or legal authority to state a claim against any University Defendant or to defeat

1 the absolute immunities afforded to Defendants. As no amendment can cure the pleading
2 deficiencies, the case should be dismissed, without leave to amend.

3 Dated: January 2, 2008

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By: /s/ GayLynn Kirn Conant

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